specialized public secondary schools.[49/]

These decisions and initiatives threaten to exclude most minorities from access to top quality educational opportunities by forcing school officials to use such sterile factors as grades and test scores as indicators of merit.[50/] Nonetheless, one's ability to score high on entrance exams is tied closely to the superior educational opportunities available to Whites in a segregated school system, and to the educational enrichment opportunities available to children who had the foresight to select wealthier parents. Moreover, colleges still may use "legacy" admissions to enroll less qualified White students prescient enough to choose

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49/ See Wessmann v. Gittens, No. 98-1657 (1st Cir., November 19, 1998) ("Wessmann"), which struck down the admissions policy of Boston Latin, the city's premier public high school. The admissions policy, adopted 23 years earlier pursuant to a court-ordered desegregation plan, reserved 35% of each entering class for African American and Hispanic students. Wessmann arose when the parents of a White ninth grade student claimed that the child was denied admission to Boston Latin because of her race. Applying strict scrutiny, the First Circuit held that past discrimination had been eliminated, making remediation unavailable as a remedy. The Court relied on Hopwood in holding that diversity is not a compelling governmental interest in secondary education.

50/ See T. Cross and R. Slater, "Special Report: Why the End of Affirmative Action Would Exclude All but a Very Few Blacks From America's Leading Universities and Graduate Schools", Journal of Blacks in Higher Education (Autumn, 1997) at 8 (explaining how a heightened reliance on standardized test scores would virtually shut out Blacks from the most prestigious colleges, universities, law schools and medical schools). In a landmark 1998 book, the former President of Princeton University and the former President of Harvard University conclude that "[i]mposition of a race-neutral standard would...reduce dramatically the proportion of black students on campus - probably shrinking their number to less than 2 percent of all matriculants at the most selective colleges and professional schools." W. Bowen and D. Bok, The Shape of the River (1998) ("Bowen and Bok") at 280.

segregation-era graduates as their relatives.[51] As a result of these decisions, Black and Hispanic enrollment in many leading schools has decreased dramatically.[52]

Fortunately, these decisions and initiatives do not restrict the FCC's ability to require broadcasters to recruit minorities, since none of the decisions and initiatives prevents targeted

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51/ However, a bill pending in the Texas House would prevent a college or university from considering whether an applicant "(1) is related by consanguinity or affinity to another person who attends or has attended the institution or a college, school, or program of the institution; or (2) has made a donation to the institution or is related by consanguinity or affinity to another person who has made a donation to the institution." See Texas H.B. 198 (by Rep. Lon Burnam) (a bill to amend Subchapter Z, Chapter 51, Texas Education Code). Apart from ensuring affirmative recruitment obligations, the only other way to even the playing field in broadcast employment would be for the FCC (by analogy to Texas H.B. 198) to bar word-of-mouth recruitment and "legacy" or intrafamily hires in broadcasting.

52/ See "Opportunities Lost: The State of Public Sector Affirmative Action in Post Proposition 209 California," (Chinese for Affirmative Action and Equal Rights Advocates, November, 1998) ("Opportunities Lost"). This first comprehensive, post-Proposition 209 study found that that in post-secondary education, affirmative action programs that addressed race- and gender-based discrimination increased access to educational opportunities, resulting in women earning 52.9% of bachelor degrees awarded by the University of California by 1997. In 1997, underrepresented minorities comprised 17.5% of the University of California's student body but 39% of California's high school graduates. The study found, inter alia, that since Proposition 209 took effect, UC Berkeley experienced a 57% decrease and UCLA a 36% decrease in the number of underrepresented minorities admitted in the fall of 1998. The study projects that Proposition 209 will result in inequality of post-secondary educational opportunities for California's diverse population, a decrease in the quality of education received at post-secondary institutions due to the decline in student diversity; a reduction in the number of minority candidates qualified to meet the needs of California's booming economy; an increase in the wage gap between members of different ethnic groups, and a limitation of remedies available to address race- and gender-based discrimination in education.

recruitment.[53/] These decisions and initiatives are germane to this proceeding for a different reason: they foretell that tomorrow's national workforce will contain relatively fewer well-educated, well-trained minorities.

Consequently, it will be particularly important for the FCC to encourage broadcasters to provide, for minorities and women, the specialized training they may not have been able to receive in college or in secondary school. Tomorrow's broadcasters should afford minorities and women the same on-the-job training opportunities they afford their own "legacy hires" -- i.e., a foot in the door and a chance to learn the trade on the job. At a minimum, any broadcaster which uses "legacy hires" must not be permitted to invoke the alleged "underpreparedness" of minorities and women as a reason to deprive them of employment opportunities.

53/ Recently, a California Superior Court issued the first comprehensive decision analyzing the application of Proposition 209, as well as the Equal Protection Clause of both the California and United States Constitutions, to five different State affirmative action programs. Wilson v. State Personnel Board, Cal.Sup.Ct., Dept. 33, No. 96CS01082 (1998) ("Wilson"). As it pertains to education, the Wilson court held that "programs that uncover discrimination and eliminate identified barriers to equal opportunity would not infringe equal protection guarantees. These programs should withstand a constitutional challenge even if they are race- and gender-conscious. The government has the constitutional authority and duty to ascertain whether it is denying its citizens equal protection of the laws and, if so, take corrective action. As long as the measures are narrowly drawn to eradicate discriminatory practices and their effects, they should not be invalidated. To the extent that Proposition 209's ban on 'preferential treatment' conflicts, it must yield to these broader, anti-discrimination principles established by federal law and the U.S. Constitution." Hence, the court concluded that the proposition does "not prohibit the use of race and gender without discriminatory or preferential intent and effect for the purpose of equalizing employment, education and contracting opportunities." Wilson would appear to authorize a program such as the FCC's proposed EEO Rule even if Congress were to nationalize Proposition 209.

Adding to the stress on minority educational opportunity is the well-known "digital divide", a term coined by Hon. Larry Irving to refer to the wide racial gap in computer availability and use. In the years to come, broadcasting will become more computer-intensive and less labor- and capital-intensive. Thus, exposure to advanced computer technology will be essential to any effort to fully diversify the mass media. Minorities are vastly underexposed to computer technology in the public schools.55/

Thus, the FCC should encourage broadcasters to share computer applications germane to broadcasting with local school districts, colleges and universities, particularly those with high minority enrollments. The FCC should also encourage broadcasters not to establish high computer sophistication as an absolute bar to employment, when broadcasters could instead offer otherwise well qualified minorities on-the-job training.55/

54/ See generally U.S. Department of Commerce, "Falling Through the Net: A Survey of the 'Have Nots' in Rural and Urban America" (July, 1995). Chairman Kennard has pointed out that "[o]nly 14% of classrooms in poor and minority school districts are connected to the Internet....While enrollment in college computer courses rose 40% in 1996, many minority students show up for college not having had access to networks computers." W. Kennard, "Thinking Ahead", presented to the NAACP 1998 Annual Convention Telecommunications Forum, July 13, 1998, at 7. See also F. McKissack, "Cyberghetto: Blacks are Falling Through the Net", The Progressive, June, 1998, at 20-22 (reporting, inter alia, that in households with annual incomes below $40,000 which had access to a telephone, Whites were six times more likely than Blacks to have used the World Wide Web in the last week, and that low-income White households were twice as likely to have a home computer as low-income Black homes.)

55/ See discussion of training initiatives in Volume II of these Comments.

B. The highest priority is adoption of a Zero Tolerance Policy

When it proposed the original EEO Rule, the Commission's goal was "achieving equal employment opportunity at the earliest possible time." Nondiscrimination - 1969, 18 FCC2d at 245. Thirty years later, the time has come to adopt a zero tolerance policy on discrimination. See Comments of MMTC et al. in the EEO Streamlining Proceeding, MM Docket 96-16 (filed September 17, 1996) at 30-34, 214-282 (inviting the Commission to design a plan to end broadcast industry discrimination and its present effects by the year 2009 -- the 100th anniversary of the broadcasting industry.) In Volume II of these Comments, we will explain in some detail how such a policy can be implemented, and we will recommend that the Commission should empanel a joint industry/public interest Task Force on Equal Opportunity to devise a workable zero tolerance plan which will achieve this goal. When this plan achieves its goal, EEO enforcement can be sunsetted. See pp. 39-54 infra.

C. A "voluntary compliance" scheme will fail because discriminators do not voluntarily provide equal opportunity

We expect that some commenters will urge the Commission to adopt a regime of "voluntary" EEO compliance or "self regulation".

Recently, a small but significant portion of the industry voluntarily stated that they would continue to operate EEO programs notwithstanding Lutheran Church.[56/] Indeed, a great many

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56/ See S. Holmes, "Broadcasters Vow to Keep Affirmative Action," New York Times, July 30, 1998, at A-12 (reporting that "[s]ome of the nation's biggest broadcasters, including the four major networks and several of the largest owners of radio stations, have agreed to continue following the Federal Communications Commission's affirmative action guidelines, even though they are no longer required to do so under a recent court decision[.]")

broadcasters have long recognized that a diverse workforce means a stronger, more competitive company.[57]

However, the history of civil rights unequivocally teaches that "voluntarism" is never enough to ensure that minorities and women will enjoy the full range of opportunities other Americans take as their birthright. School integration could have been adopted "voluntarily", but it was not. Court-ordered "voluntary" programs almost uniformly failed to produce integrated schools; that is the primary reason why most urban schools today are nearly as segregated as they were in 1954. Restaurants, hotels, bus lines, and airlines could have integrated voluntarily; but they did not. Passage of the 1964 Civil Rights Act was needed precisely because the nation's experience in the period since Brown v. Board of Education[58] proved clearly that legislative remedies were required to protect civil rights.

Broadcasting has not been immune to the social forces that necessitated a government role in civil rights enforcement. The EEO Rule was needed because it soon became evident, after 1964, that Title VII was insufficient to bring about any meaningful integration of the broadcasting business.

If there is any doubt whether broadcasting is any more likely to "voluntarily" integrate than the rest of the country, a look at

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57/ See K. Bachman, "Radio's diversity divide", Radio Business Report, May 25, 1998, at 4. Of special note is twenty-seven broadcast and cable companies' support for the Emma L. Bowen Foundation for Minority Interests in Media. The Foundation places students in internships with media companies and matches their college tuition. See "Companies Boost Minority Intern Effort," Fair Employment Report, December 16, 1998, at 190.]

58/ Brown v. Board of Education, 347 U.S. 483 (1954) ("Brown I").

the unregulated station brokerage business should provide the answer. Virtually all station brokers were once broadcasters -- in fact, they were among the most successful broadcasters, and they are the cream of the industry. To be successful in the brokerage business, one must reflect the values and mores of the industry as a whole.

Thus, it is telling that the broadcast brokerage business is the most segregated business in America. Of the approximately 150 brokers, MMTC serves as the closest thing there is to a full service minority station broker, and to our knowledge no minority person has ever worked as a full service station broker. We know of not one broker who has even trained or provided an internship to a minority person. What in the world has been stopping broadcasters, for the past three generations, from "voluntarily" adopting a code of conduct by which they would refuse to deal with racially segregated brokerage companies?59/

The newspaper industry's experience further discloses the inadequacy of "self-regulation." We have recently witnessed the collapse of the newspaper industry's voluntary EEO initiative. In 1978, the American Society of Newspaper Editors (ASNE) pledged that newsrooms would mirror the nation's racial composition by the year

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59/ Self-regulation is not feasible in broadcasting for other reasons besides racial insensitivity -- paramount among them being competitive pressures and internal philosophical differences within the industry. An excellent discussion of the failed history of industry codes as an alternative to FCC content regulation is found in M. MacCarthy, "Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour and Television Violence," presented at the Columbia Institute for Tele-Information, Columbia University, at the symposium "Television Self-Regulation and Ownership Regulation: The American Experience," March 10, 1995.

2000. At that time, minorities made up 4% of daily newspaper staffs and 17% of the population. ASNE's pledge was unanimously endorsed as "fair and obtainable". But by 1998, the newsroom workforce was still only 11.5% minority. According to to ASNE President Edward L. Seaton, "these results are appalling when measured against our stated goal of parity with the minority population of the country, now at 26 percent. They are also embarrassing when radio and television are at 20 percent minority employment, nearly twice our level."[60/] Yet last fall, rather than proposing intensified efforts, ASNE abandoned its goal, proposing instead to attain 20% minority representation by 2010 even as the national minority population continues to grow.[61/] Today, 42% of daily papers' newsrooms still employ no minorities.[62/]

A recent survey of business executives provides stark evidence of what would happen to EEO in broadcasting if EEO compliance were "voluntary." The study, conducted December 5-18, 1996 by Yankelovich Partners for PBS' Nightly Business Report, was based on interviews with 316 executives.[63/] It found that 64% of

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60/ "American Society of Newspaper Editors", The Diversity Factor, Fall, 1998, at 19 (reporting on remarks made in The American Editor, May, 1998). The advertising industry, lacking even a voluntary program, has an even worse record. See p. 22 n. 45 infra.

61/ See J. Jackson, "Media Blacksliding on Representation", Extra!, November/December, 1998, at 6; P. Newkirk, "So Much for Newsroom Diversity," The Nation, July 6, 1998 ("Newkirk"), at 12. Media critic Norman Solomon has given this phenomenon a name: "Diversity Fatigue."

62/ Newkirk, supra.

63/ See "Executives View Diversity as Important, But Few Operate Programs, Finds Survey," Fair Employment Report, February 26, 1997, at 38.

these executives believe diversity is important in the workplace. However, only 9% of the respondents operate specific diversity programs in their companies.64/ This pattern holds true even among huge companies for which the expense of operating a diversity program is a mere rounding error. Eighty-six percent of large company executives (annual sales over $100 million) believe diversity is important, but only 41% conduct such diversity programs.65/

Perhaps the only serious argument for self-regulation is that because EEO is good business, marketplace forces can be trusted to drive out discriminators. But there are two reasons why this argument is of limited merit.

First, many broadcasters see EEO as good business only in the long run. They prefer for the costs of training and mentoring to be borne by others. Thus, without EEO regulations, the well known economic "free rider problem" would result in no broadcasters being willing to share the collectively modest costs of training and mentoring.66/ Many broadcasters would just wait to reap the

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64/ Id. This includes executives in companies required by law to operate diversity programs (e.g. FCC licensees and some federal contractors subject to OFCCP regulations.) Thus, without regulation, only a very small fraction of companies promote diversity "voluntarily".

65/ Id.

66/ The "free rider" problem is well known in the network/affiliate context. See B. Owen and S. Wildman, Video Economics (1992) at 171-72. This same fact of economic life explains why the marketplace is insufficient to promote sound broadcast engineering and efficient spectrum use. Like EEO, wise engineering helps the industry as a whole, but it's not always perceived by every station as serving its own short-term interest. See U.S. v. Zenith Radio Corp., 12 F.2d 614 (D.C. N.D. Ill. 1926) ("Zenith"). This also explains why the marketplace, acting alone, cannot solve problems like theft, pollution, food quality, drug safety, or even traffic safety.

The Not So Good Old Days

Wash. Post, 2/14/99, P. B-8

I too would like to supplement Vance Garnett's list for native Washingtonians [Close to Home, Jan. 10 and Jan. 24].

I am a 51-year-old African American native son of Washington. My father was a veteran of World War II. I was born in Freedmen's Hospital and raised during the "idyllic" postwar years in a racially segregated community on the fringe of Catholic University in what is now Ward 5.

I say, you know you are a native Washingtonian if you can remember when:

- World War II veterans, who had fought gallantly to defend democracy, sought housing opportunities for their young families by searching the classified advertisements of the local newspapers, under the heading: "Houses for Sale Colored."
- The ritzy Garfinckel's department store and many of its competitors would permit the young wives of World War II veterans to purchase dresses but not allow them to try on the clothing.
- The children of the World War II veterans asked: "Dad, where is Glen Echo Park? Can we go there?"
- The D.C. Post Office employed more black attorneys than the D.C. Office of the Corporation Counsel did.
- The D.C. Teachers College maintained two campuses: Miner for "Negro" teachers and Wilson for white teachers.
- The kindergarten and first-grade children waited with gleeful enthusiasm for their first Dick and Jane readers but received only soiled and tattered books discarded by the nearby white schools.
- All of the anchors and reporters on our black-and-white TV were white.
- George Preston Marshall refused to recruit any black Redskins.
- No black police officer was promoted above the rank of sergeant.
- All of the above occurred under the auspices of three white men appointed by the president to rule the capital of the free world.

My, what a place Washington was during those good old days.

—Robert K. Jenkins Jr.

harvest of diversity, and too few would plant the crop.

Second, an unfortunately large number of broadcasters do not realize -- and in many cases cannot be persuaded -- that EEO is good business for them. As with any other aggregation of American businessmen, some broadcasters are mentally locked into the confederate age. They see the pre-civil rights era as "the good old days", not thinking a minute about whether it was good for minorities or women.67/ Candidly, many broadcasters are simply not comfortable working around or delegating responsibility to

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67/ Owing to its lack of staff diversity, the mass media often reflects this sentiment. See pp. 159-66 infra. Recently, the Washington Post published a facially innocuous column listing the unique attributes of pre-1960 Washington, D.C. which native Washingtonians would remember fondly. It apparently did not occur to the author, or the newspaper, that African Americans would not remember their town at that time in the same light. See R. Jenkins, Jr., "The Not So Good Old Days" [Letter], Washington Post, February 14, 1999, at B-8, reprinted above.

minorities or women.[68] The marketplace provides no incentive for these broadcasters to practice equal opportunity, much less provide it. These broadcasters control sizeable numbers of jobs, and those jobs are unavailable to minorities and women unless the FCC steps in with EEO regulations. Even if these broadcasters were fairly small in number, it would be indefensible for the FCC do nothing to prevent minorities and women from experiencing the personal indignity which attends applying for unattainable jobs, or being made to work in jobs from which promotion or real influence is unattainable. And it's unfair to continue to subject the listening and viewing public to anything less than the full range of voices and viewpoints which would flower on the airwaves if we enjoyed full equal employment opportunity in broadcasting. See pp. 134-66 infra.

Law abiding broadcasters fear nothing from EEO enforcement. A highway patrolman clocking speeders offends no one who does not speed excessively. Moreover, strict enforcement of fair EEO regulations will not deter many decent broadcasters from voluntarily doing more than the minimum required by any regulations the FCC might adopt.

68/ In our experience, this aspect of the problem infects even those broadcasters whose corporate parents are strong supporters of equal opportunity. Rogue units exist in any large company, because middle managers have a wide range of backgrounds, philosophies and operating styles. Corporate policy does not always filter down to the station level. It was easier for forward looking companies to avoid discrimination by their middle managers before 1996, when consolidation took hold in the industry. A few very large companies have been remarkably successful in filtering their CEO's firm commitment to equal opportunity down to every station they own: Clear Channel, CBS, Cox, Capstar, Gannett, Post-Newsweek, NBC, Disney and Fox are good examples, and there are others. But too many companies are growing faster in size than they can grow good human relations departments -- leaving too many stations as hot spots of unequal opportunity.

D. Declaring EEO compliance unrelated to a broadcaster's qualifications for renewal would be a cruel joke on the listening and viewing public

We anticipate that as an alternative to "self-regulation," EEO opponents will try to persuade the Commission to enact the most watered-down, unenforceable EEO regulations imaginable.[69/] Some industry commenters will seek regulations which can be stored away in the attic of the Commission's Rules, suitable only to be trotted out when evidence of "public interest commitments" is needed as protection against spectrum auctions. They will want regulations analogous to the public file rule, violation of which never results in any consequences beyond a rare admonishment at license renewal time; or regulations that amount to little more than checking a few boxes every eight years. No adverse consequences would attend providing unequal opportunity -- only lying about it.[70/]

69/ See Nondiscrimination - 1968, 13 FCC2d at 766 (reporting that the sole objection to the proposed nondiscrimination requirement was filed by the NAB, which was "sympathetic to the basic goals of the petition" but expressed reservations about the proposed rules reporting requirements and enforcement.") In 1995, the NAB stated that the EEO Rule "unduly emphasizes efforts over results, and provides broadcasters and Commission staff alike with little clear guidance regarding how a station may be in compliance with the EEO rules." Letter from Henry L. Baumann, Executive Vice President and General Counsel, National Association of Broadcasters, to Roy J. Stewart, Chief, Mass Media Bureau, FCC (September 15, 1995), MM Docket No. 93-34. Of course Lutheran Church now renders consideration of "results" impossible.

70/ More recently, the NAB floated a so-called "compromise" that "would require broadcasters to certify every two years that they have tried to recruit minorities and women." The proposed scheme would "free broadcasters from any obligation to document EEO compliance at the Federal Communications Commission, with enforcement left to random FCC audits. 'Unless there was evidence that a station had falsely certified, no additional review would be conducted at license renewal,' the NAB said in a confidential Jan. 28 [1999] memo to its board members." D. Halonen, "NAB pitches own EEO compromise", Electronic Media, February 1, 1999, at 36.

Even an egregious public file violation is not the FCC equivalent of a high crime and misdemeanor,[71] and none has ever compelled removal of the licensee from office. But discrimination goes to the heart of what being a broadcaster is all about -- serving as a trustee of the spectrum "without discrimination on the basis of race, color, religion, national origin, or sex". 47 U.S.C. ¶151 (1996). It is an impeachable offense. See, e.g., Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 629-30 (D.C. Cir. 1978) ("Bilingual II").

EEO's detractors cannot mean to suggest that tying EEO enforcement to license renewal would "pressure" broadcasters to hire minorities and women. Such an argument would prove too much. Following its logic, any adverse consequences of noncompliance with EEO regulations would "pressure" broadcasters in some way. But as long as broadcasters are only "pressured" to open their doors and provide equal opportunity and not hire based on factors other than merit, the regulations will be valid as a race-neutral regulation. See pp. 55-86 infra. It is not wrong to "pressure" a regulatee to do a constitutionally permissible thing. A valid regulation is not rendered invalid by the fact that it is enforceable.

The only meaningful way in which any EEO regulations could be enforceable is to have EEO performance reviewed at renewal time.[72]

71/ See, e.g., The Detroit News, Inc., 13 FCC Rcd 3455 (1997).

72/ That is one reason why TV mid-term reviews have been of little value. Broadcasters see these numbers-driven reviews as meaningless paperwork exercises. Thus, we generally support the NPRM's proposal to convert mid-term reviews into a meaningful undertaking -- provided it is more than mere box-checking. NPRM, 13 FCC Rcd at 23030 ¶76. Too many broadcasters have failed to review their list of recruitment sources more than once every eight years. A mid-term review ought to ensure that recruitment sources are reevaluated more frequently.

In our experience, broadcasters will have little incentive to recruit minorities and women unless they are held accountable when their renewals are due. Indeed, given the express language in Section 309(a),[73] a Commission policy disconnecting EEO enforcement and renewal would first require a holding that discrimination, or inherently discriminatory behavior such as word-of-mouth recruitment from a homogeneous workforce,[74] serves the "public interest, convenience and necessity." Such a holding would be a cruel joke on the listening and viewing public.

E. The EEO regulations should be sunsetted after full equal opportunity is achieved

Civil rights supporters and opponents ought to agree that if the Commission adopts a campaign to eradicate the disease of discrimination, that campaign should have a forseeable termination date. That date should be the date that the objective is achieved.

When the Commission has succeeded in achieving the end of discrimination and its present effects, it may follow the President's advice that an affirmative action program "should be retired when its job is done," Affirmative Action Address at 14. Thereupon, the Commission need only leave in place a small monitoring staff to ensure that there is no unanticipated return to a pattern of unequal opportunity. Nothing would make the civil

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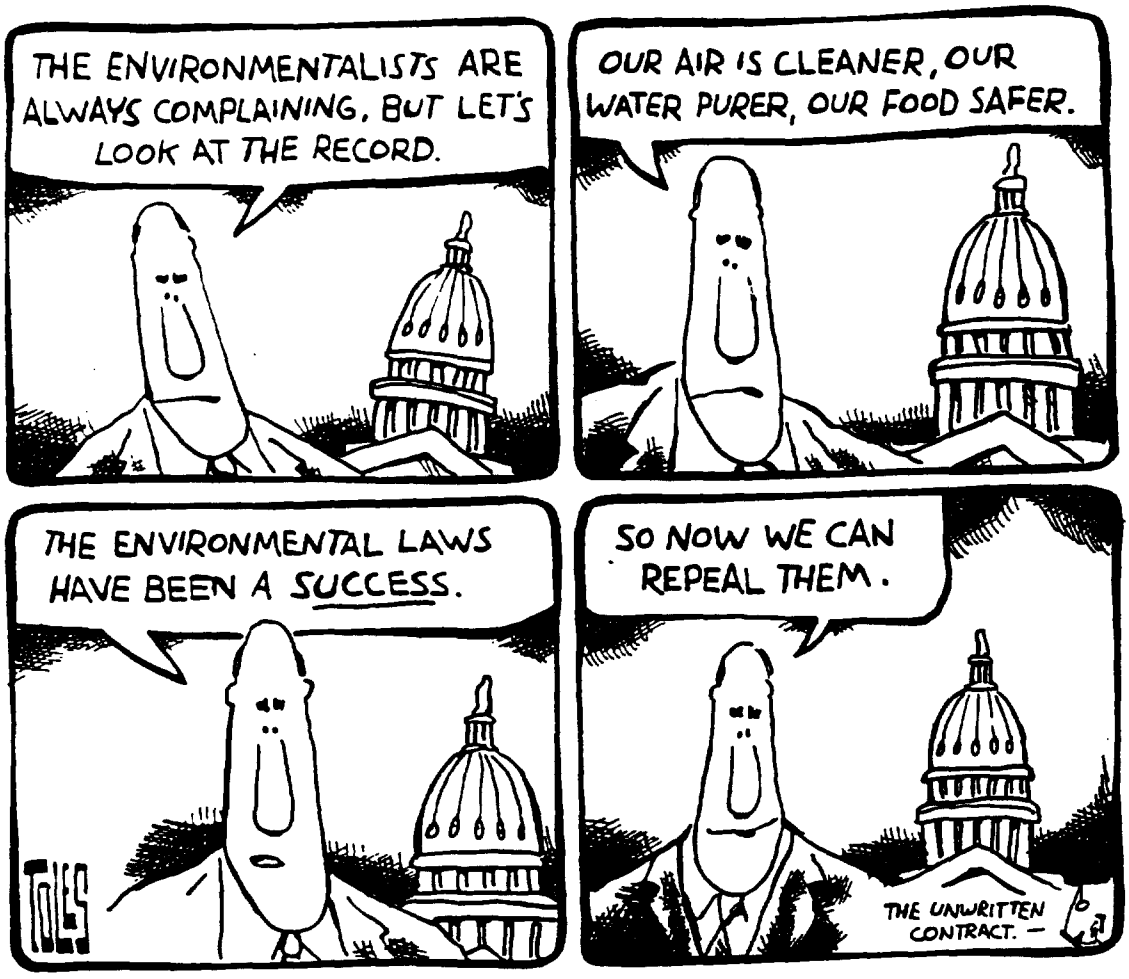
73/ The Commission "shall determine...whether the public interest, convenience and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commion may officially notice, shall find that the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application." 47 U.S.C. §309(a) (1996).

74/ See discussion at 63-72 infra.



rights community happier than not having to worry about EEO enforcement anymore. Such an approach would likely meet with bipartisan approval, inasmuch as sunsetting plans have been embraced by the Carter, Bush and Clinton administrations.[75/] Agencies are free to adopt their own sunset provisions even if the

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75/ See Executive Order 12,886, Section 5 (September, 1993) (requiring all federal agencies to submit to OMB plans for periodic review of their significant regulations). See also N. Eisner and J. Kaleta, "Federal Agency Reviews of Existing Regulations", 48 Admin. L. Rev. 139 (Winter 1996) ("Eisner and Kaleta") (discussing Bush and Carter administrations' sunsetting policies).

governing statute is silent on sunsetting, as is the case in media and telecommunications.[76]

What criterion should the Commission rely on to determine when discriminatory practices are no longer able materially to distort the free marketplace and deny equal opportunity to all Americans? The answer is probably this: when the representation of minorities and women in broadcasting reaches parity with minorities' an women's representation in the population[77] at all levels, including sales and senior management, then common discriminatory practices such as word-of-mouth recruitment from a homogeneous workforce will cease to be a useful tool for maintaining discrimination. When parity is achieved, minority and female employees' own word-of-mouth networks will naturally result in inclusion of talented minorities and women in most applicant

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76/ See T. Hall, "The FCC and the Telecom Act of 1996: Necessary Steps to Achieve Substantial Deregulation," 11 Harv. J. L. & Tech. 797, 817 (Summer, 1998) (explaining, in the Title II context, that the notwithstanding Congress' failure to include sunsets in the Telecommunications Act, "the FCC can place sunsets on its own regulations.")

77/ When the Commission tracks minority and female advancement relative to demographic statistics, it should bear in mind that minorities and women are joining the workforce at a more rapid pace than White males. For minorities, immigration and a longer baby boom than experienced by Whites fuels this growth in labor force participation; for women, emancipation from traditional "homemaker" roles fuels this growth. See Mary Mattis, "Women's glass ceiling can be dismantled," Electronic Media, August 28, 1995: "Women constitute 45 percent of the work force and are more committed to their careers than ever, work later into pregnancy and return to work more quickly after childbirth. Nearly three out of five mothers with children 2 years of age or younger are in the work force, according to the Bureau of Labor Statistics."

pools.[78] As the Commission has long realized, "industrywide attainment of workforce parity is a good indicator of the cumulative success of a national EEO initiative."[79]

Full inclusion of minorities and women in broadcasting can be achieved by the year 2009, the 100th anniversary of broadcasting. Minorities and women are already securely established in broadcast clerical jobs; see p. 47, Table 2 infra. Furthermore, in many communities, minorities and women are growing close to parity in the lowest level professional and sales assistant jobs -- the first step up the corporate ladder leading to top management. Given the workplace trends documented by the Federal Glass Ceiling Commission, it is reasonable to predict that those who assumed those positions in the early 1990's would attain top management roles by 2009 if the Commission accelerates its commitment to

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78/ A fair question is whether, even after workforce parity in top management is achieved, discrimination-minded broadcasters could develop a strategy to replace word-of-mouth recruitment with yet another tool to implement discrimination. It is certainly conceivable that diehard segregationists might do this. See, e.g., T. Cross and R. Slater, "Once Again, Mississippi Takes Aim at Black Higher Education," Journal of Blacks in Higher Education (Summer, 1996) at 92 (discussing state's plans to use test scores to severely limit Black enrollment at the University of Mississippi and other state institutions which discriminated for generations). We trust, though, that once women and people of color thoroughly populate the highest ranks of top management and ownership of our largest broadcast corporations, their networking ability and our democratic traditions will prevent racism and sexism from again threatening their positions in society.

79/ Nondiscrimination - 1969, 18 FCC2d at 243.

strong EEO enforcement.[80] In 1971, when the Commission adopted the EEO Rule in essentially its present form, minorities were 8.0%, and women were 10.2% of fulltime professional broadcast employees. In 1997, minorities were 19.2%, and women were 35.9% of fulltime professional broadcast employees. See p. 46, Table 1 infra. Given perhaps just over a decade of modest enforcement, broadcasting could become the second industry[81] in which affirmative action could be declared to have achieved its goal.

The sunset policy should be tailored with a measureable goal rather than being linked to an arbitrary calendar date. Establishing a sunsetting goal would represent prudent regulatory policy in three respects.

First, it would help narrowly tailor the regulations,[82] providing assurance that the regulations will be imposed only to

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80/ According to the FGCC, "[c]orporate leaders estimate that it takes 20 or 25 years in a corporation to achieve a high-level management position. That means that businesses who sought inclusion in the late 1960s are now cracking the ceiling, while most of those who started later are far behind. Using that same measure, businesses that are just beginning to diversify their workforces are unlikely to see significant change at the senior levels until well into the 21st century. This is not meant to be a justification for lack of progress. It is a warning - the later a business starts, the later it will get where it is going." Glass Ceiling Environmental Scan at 36.

81/ The military is almost there. See Address of General Colin Powell, Republican National Convention, August 12, 1996 (federal government has a duty "not only to cut off and kill discrimination, but to open every avenue of educational and economic opportunity to those who are still denied access becauase of their race, ethnic background or gender.")

82/ This is wise even though the proposed regulations would not be evaluated under strict scrutiny. See U.S. v. Paradise, 480 U.S. 149, 178 (1987) ("Paradise") (sunsetting is useful for narrow tailoring purposes in a program governed by strict scrutiny.)

the extent and duration necessary to achieve legitimate regulatory goals.83/

Second, it would encourage broadcasters to reach the regulatory goals as soon as possible. Goals inspire and motivate achievement. On the other hand, a predetermined calendar sunset date would be misread by some broadcasters as a signal that they need do nothing now foster equal opportunity, because the regulations will die soon anyway.

Third, it would enable the Commission to periodically review the effectiveness of the regulations and improve upon them. A well-designed sunset provision may guide future commissions, but it does not bind them.84/ Sunsetting tied to goals enables an agency to be responsive to new precedents, to try different approaches if the government changes hands, to respond to changes in technology,

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83/ Law and economics scholar Guido Calabresi has criticized "legislative inertia" -- the tendency of legislatures to leave obsolete laws intact -- as a major source of the glut in the legal system. See generally G. Calabresi, A Common Law for the Age of Statutes (1982).

84/ In 1981, a Florida court denied a constitutional challenge by an association of regulated motor carriers who lost certificates of public convenience and necessity as a result of a sunset repeal of the certification procedure. Alterman Transport Lines, Inc. v. Florida, 405 So. 2d 456 (Fl. Dist. Ct. App. 1981) ("Alterman"). The certificates had endowed the plaintiffs with protection against competitors, in much the same way that a broadcast license protects its holder from others seeking to use the airwaves. Like a broadcast license, it was unlawful to operate without such a certificate, and certificates were granted to only a few companies. Id. at 459. Florida's 1976 Sunset Act called for the repeal of the certificating procedure in four years, subject to review and reestablishment by the state legislature. Id. at 458. When the legislature failed to renew the provision in 1980, the plaintiffs' licenses were invalidated. Id. Rejecting state due process claims, the court held that the Sunset Act was not an impermissible attempt by a previous legislature to bind subsequent legislatures, which were free to rescind the act or change its effective repeal dates. Id. at 460.

or to reevaluate the direction of a program based on its measured costs and benefits. Eisner and Kaleta at 144.

A review of industrywide statistics reveals how far we have come and how long it might take to achieve full inclusion of minorities and women in the broadcasting industry. The questions which present the starting point for any informed analysis leading to possible sunsetting include:

- What is the representation of minorities and women in broadcast employment?
- In which categories are minorities and women best and least well represented?
- Is their representation growing, and if so, at what rate?
- At that rate of growth, how long will it take for minorities and women's representation in broadcast employment to reach parity with their presence in the population?

Minority and female professional employment is a useful indicator of opportunity in the broadcasting industry in jobs that are especially germane to viewpoint diversity. The data shown below, derived from the Commission's annual EEO Trend Reports, begins in 1971, the year the Commission adopted subsections (b) and (c) of the former EEO Rule. It illustrates the slow but steady progress minorities and women have enjoyed.

TABLE 1

Employment of Minorities and Women in Fulltime Broadcast Professional Capacities, 1971-1997

Year	% Minority Professionals	% Female Professionals
1997	19.2%	35.9%
1996	18.8%	35.2%
1995	18.6%	34.5%
1994	17.2%	33.1%
1993	17.2%	33.1%
1992	17.4%	32.9%
1991	16.6%	32.8%
1990	16.2%	31.9%
1989	15.8%	31.8%
1988	15.0%	31.3%
1987	14.7%	30.8%
1986	14.4%	30.3%
1985	14.3%	29.9%
1984	13.8%	29.7%
1983	13.7%	29.0%
1982	13.9%	28.0%
1981	13.9%	27.3%
1980	13.4%	25.7%
1979	13.3%	24.0%
1978	12.5%	22.3%
1977	12.2%	20.1%
1976	11.9%	18.5%
1975	11.5%	16.8%
1974	10.9%	15.0%
1973	10.1%	12.9%
1972	8.7%	9.7%
1971	8.0%	10.2%

As shown in Table 1, minorities were 8.0% of fulltime broadcast professional employees in 1971. In 1997 (the last year for which data is available), minorities were 19.2% of fulltime broadcast professional employment. This rate of growth was sustained by the FCC's EEO program. See p. 22 n. 45 and 32-33 supra (discussing statistics on employment in print journalism and advertising).

Data in the EEO Trend Report - 1995 (analyzed by MMTC for its 1996 EEO Streamlining Comments) permits an iteration of the extent to which minorities and women have succeeded in reaching national

workforce parity in a number of job categories. That data is given below in Table 2.85/

TABLE 2

PERCENTAGES OF PARITY ATTAINED BY MINORITIES AND WOMEN IN SELECTED JOB CATEGORIES (1995)

Job Category	Protected Group	Radio	Television	Radio and Television	Headquarters
Officials/Managers	Minorities	55.6	59.1	57.2	49.8
	Women	74.3	80.0	76.7	63.8
Professionals	Minorities	72.0	80.3	76.5	75.7
	Women	55.1	91.7	76.7	98.9
Technicians	Minorities	93.4	98.4	98.0	70.8
	Women	19.7	32.8	31.6	36.4
Salespersons	Minorities	55.5	54.1	55.0	55.2
	Women	112.9	113.7	113.1	117.2
Top Four Categories	Minorities	63.8	78.5	72.6	64.1
	Women	74.5	71.5	72.7	74.7
Office & Clerical	Minorities	123.9	135.4	132.6	116.9
	Women	191.9	191.9	191.9	193.5

85/ As used herein, "percentage of parity" refers to the ratio between the percentage of a protected group (minorities or women) in a given category of broadcast employment and the percentage that group represents in the national workforce.

In Tables 2-4, data for commercial radio and noncommercial radio were combined, and data for commercial television and noncommercial television were combined. Data reported as "Radio and Television" includes all broadcast stations and excludes Headquarters data. Data for Office and Clerical employees is broken out because it is the only one of the "bottom five" job categories in which more than 1,000 persons were employed. There were not enough employees in the other four "bottom five" categories to permit meaningful analysis of national employment data.

All EEO data reflected or used by MMTC to derive the figures given in Tables 2-4 were derived from the EEO Trend Report - 1995. U.S. Census Bureau estimates give the percentage of minorities in the national workforce as 22.0% in 1991 and as 24.2% in 1995, and give the percentage of women in the national workforce as 45.3% in 1991 and 45.9% in 1995.

Table 2 clearly shows where the Commission should be focusing its EEO enforcement efforts. Secretarial positions no longer require very much FCC EEO enforcement. Indeed, continued emphasis on secretarial or janitorial hiring could mislead broadcasters into thinking that the hiring of a minority or female secretary, receptionist or janitor immunizes them from the consequences of their failure to recruit for or hire minorities and women in the top four category positions.

Table 2 also shows that the Commission's EEO program has already succeeded in achieving full gender integration in an important job category, Salespersons. Thus, it would be appropriate for the Commission to develop an indicator of women's attainment of senior positions in sales management -- positions which have the greatest job networking potential. When women are fully integrated <u>at all levels</u> in the Salespersons category, they will possess the networking ability which already permits women in the Office and Clerical catetgory to replenish their numbers even in the absence of affirmative action requirements. When that happens, affirmative action efforts aimed at women in the Salespersons category can be focused elsewhere -- because they will have succeeded.

Women in television professional jobs, and minorities in radio and television technical jobs are also well on their way toward achieving parity. This is a remarkable achievement, considering the fact that there were virtually no women in television operations and no minorities in broadcast engineering just a three decades ago. However, it appears that women are

grossly underrepresented as technicians, particularly in radio, and they are seriously underrepresented as professionals in radio.

Minorities continue to be very poorly represented as officials and managers and salespeople in both television and radio.86/ In our experience, the low representation of minorities in sales positions derives from several impermissible factors, including (1) many stations' open (or covert), conscious (or subconscious) assumption that minorities can't sell their format; (2) the perception of some broadcasters that a significant number of time buyers prefer to deal with White account executives; (3) the failure of many broadcasters to include sales training in their in-house training and internship programs; (4) the hesitancy of some broadcasters to consider, for sales employment, minorities with solid sales experience in other fields (e.g. automotive, retail and real estate); (5) the country-club atmosphere of the broadcast sales business, which injects into the sales environment prejudices embedded in other areas of American commerce; and (6) the inherent "networking" nature of sales, which inevitably translates itself into word-of-mouth job recruitment. Indeed, minority entry into broadcast sales, and female entry into broadcast engineering, may well be the most critical immediate need for FCC EEO scrutiny.

86/ These are precisely the job categories most essential to one's eventual movement from employment to entrepreneurship -- further underscoring the need for minorities to develop much more rapidly in these critical job categories. See pp. 167-74 infra.

In headquarters employment, minorities and women appear to be somewhat less well represented than they are in station employment.87/ There are probably three reasons for this. First, headquarters staffs often include longer tenured individuals, including those recruited from the company's owned stations. Second, headquarters staffs may have wider responsibilities, and thus may require more training and expertise than do line employees. Third, unlike station employees, headquarters employees were not subject to the original EEO Rule, which provided an important incentive for employers to recruit and hire minorities and women aggressively for station positions. The low representation of minorities and women in headquarters employment is especially troubling because growing consolidation of stations into superduopolies will inevitably result in a significant shift of employees away from stations into headquarters staffs. Consequently, it would be appropriate for the Commission to begin to examine headquarters EEO data and to require the filing of headquarters EEO programs in connection with renewal applications.

The percentage of workforce parity in minority and female employment attained nationally, and the rate at which the representation of minorities and women has changed, are good indications of the success of the Commission's EEO program. Table 3

87/ The only exception seems to be the representation of women in the top four categories in headquarters staffs, which exceeds their representation at the station level. That anomaly in the data appears attributable to the fact that headquarters staffs, especially in television, employ relatively far fewer technicians than do station staffs. Women are severely underrepresented among technicians at the station level, pulling down their overall representation in the top four categories at the station level. Consequently, women are actually better proportionally represented in headquarters staffs in the top four categories than they are at the station level.

sets out the percentages of parity attained by minorities and women, in several categories of broadcast employment, in 1991 and in 1995.88/

TABLE 3

PERCENTAGES OF PARITY ATTAINED BY MINORITIES AND WOMEN IN POTENTIALLY REGULATED CATEGORIES (1991 and 1995)

Job Category	Protected Group	Year	Radio	Television	Radio and Television	Head-quarters
Officials/Managers	Minorities	1991	56.0	54.5	55.3	58.6
	Minorities	1995	55.6	59.1	57.2	49.8
	Women	1991	72.2	73.3	72.6	61.4
	Women	1995	74.3	80.0	76.7	63.8
Top Four Categories	Minorities	1991	63.1	79.1	71.6	90.5
	Minorities	1995	63.8	78.6	72.6	64.1
	Women	1991	71.7	68.0	69.5	74.0
	Women	1995	74.5	71.5	72.7	74.7

The rate at which protected group employment grew between 1991 and 1995 yields a very useful number: the year by which, at that rate of growth, parity will ultimately be attained. MMTC calculated these years for parity achievement and have set them out in Table 4. We emphasize that these are not target or proposed sunset dates, see p. 44 supra; rather, they are presented to illustrate how far we have to go to achieve workforce parity.

88/ The categories MMTC selected are Officials and Managers and the top four job categories. Officials and Managers is the key job category for decisionmaking, networking to replenish the representation of members of one's group, and preparation for entrepreneurship. MMTC selected the year 1991 as our baseline because it is the year farthest back in time for which the state of market conditions and federal civil rights protections can be said to have been essentially the same as they were in 1995. 1995 was the year before the wave of consolidation began, and 1991 was the year after the adverse effects of Ward's Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) ("Ward's Cove") and Croson were felt in the national employment marketplace.

TABLE 4

YEAR BY WHICH PARITY WILL BE ATTAINED BY MINORITIES AND WOMEN IN POTENTIALLY REGULATED CATEGORIES, GIVEN THE CHANGE IN MINORITY AND FEMALE REPRESENTATION BETWEEN 1991 AND 1995

Job Category	Protected Group	Radio	Television	Radio and Television	Head-quarters
Officials/Managers	Minorities	Never	2036	2090	Never
	Women	2046	2008	2019	2057
Top Four Categories	Minorities	2207	Never	2110	Never
	Women	2032	2029	2030	2141

The data in Table 4 is quite disturbing, for it appears that in many categories of employment, the rate of change in minority or female representation is often so slow that parity could not be achieved by the year 2009 and, indeed, may not be achieved in our lifetimes. Specifically:

- We are on target to reach parity for minorities in broadcast station management by 2090, the 150th anniversary of the date on which the FCC issued its first First Class Radiotelephone License to a Black man.
- We are on target to reach parity for minorities in the top four categories in broadcast stations by the year 2110 -- one year too late to miss the 200th anniversary of broadcasting.
- We are on target to reach parity for women in broadcast station management by the year 2019 -- one year short of the 100th anniversary of the 19th Amendment.
- We would reach parity for women in the top four categories of broadcast stations by 2030, the 50th anniversary of the year the Equal Rights Amendment died.
- Minority representation in radio station management, in the top four categories of television station employment, and in both management and the top four categories of broadcast headquarters employment is declining. Unless these trends in minority representation are reversed, we will never reach parity for minorities in these categories.

From this data, we must conclude that a significant increase in the strength of FCC EEO enforcement will be required in order

to enable minorities and women to reach national workforce parity by 2009, or indeed within the lifetimes of most of us.

Finally -- recognizing that top station management is the last frontier for equal opportunity -- last month MMTC conducted a survey to determine the race of television general managers in the top ten television markets and radio general managers in the top ten radio markets. The fruits of this research are provided in Tables 5 and 6.89/

TABLE 5

RACE OF TELEVISION STATION GENERAL MANAGERS IN THE TOP TEN TELEVISION MARKETS IN 1999

Market	Number of Stations	Women	African-Americans	Hispanics	Asian Americans
New York	20	6	0	0	1
Los Angeles	22	2	0	3	0
Chicago	16	5	2	1	0
Philadelphia	18	4	2	0	0
San Francisco	20	4	0	1	0
Boston	20	3	0	0	0
Washington	17	4	1	0	0
Dallas-Ft. Worth	18	7	0	2	0
Detroit	9	2	1	0	0
Atlanta	12	1	0	0	0
Total	172	38	6	7	1

Total Number of Women Managers: 38 out of 172 (22.1%)
Total Number of Minority Managers: 14 out of 172 (8.1%).

89/ Data reported in this study is for stations identified in BIA Television Yearbook (1998) and BIA Radio Yearbook (1998).

TABLE 6

RACE OF RADIO STATION GENERAL MANAGERS IN THE TOP TEN RADIO MARKETS IN 1999

Market	Number of Stations	Number of Managers	Women	African-Americans	Hispanics	Asian Americans
New York	52	36	11	3	1	2
Los Angeles	54	43	5	2	2	2
Chicago	42	40	8	2	2	0
San Francisco	40	33	4	0	6	1
Philadelphia	43	37	2	4	0	0
Dallas-Ft. Worth	49	35	4	3	3	0
Detroit	42	34	8	1	0	0
Washington	45	38	10	2	1	1
Houston	51	35	4	1	6	0
Boston	52	49	4	1	0	0
Total	470	380	53	19	21	6

Total Number of Women Managers: 53 out of 380 (13.9%)
Total Number of Minority Managers: 46 out of 380 (12.1%).

This type of data, as well as data on recruitment effectiveness, can assist the Commission in evaluating and fine-tuning its program so that it will achieve its goals in a reasonable time and be eligible for sunsetting.

* * * * *

II. Is Recruitment Race-Neutral and Gender-Neutral?

A threshold question is whether the FCC's proposed program of targeted recruitment is race- and gender-neutral, as the courts understand those concepts.

Recruitment-based affirmative action programs have generally been thought noncontroversial. No court has ever invalidated a program based on targeted recruitment unevaluated by hiring statistics, and as shown infra, courts universally look upon them with favor.

These programs enjoy the full support of the administration. The Justice Department's Office of Legal Counsel has expressed the administration's approval of programs whose "objective...is to expand the pool of applicants...to include minorities, not to use race or ethnicity in the actual [hiring] decision." Memorandum to All Agency General Counsels from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice (June 28, 1995) at 7 (fns. omitted). If the program meets this standard for race- and gender-neutral programs, it would be subject to rational basis review.[90/]

90/ See Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (under rational basis review, the challenged government action is constitutional where it "classif[ies] the persons it affects in a manner rationally related to legitimate governmental objectives"); Plyler v. Doe, 457 U.S. 202, 216 (1982) ("[i]n applying the Equal Protection Clause to most forms of state action we...week only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.") "[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." Heller v. Doe, 509 U.S. 312, 319 (1993). Rational basis review requires only that the government demonstrate that it has a reasonable basis for its policy, and the policy should be upheld "even when there is an imperfect fit between means and ends." Id. at 321.

Furthermore, if the Commission should find it necessary to adopt race-sensitive programs in another area (minority ownership), it will need first to implement race-neutral programs aimed at that goal. See pp. 167-74 infra. In that case, it will be profoundly important that the Commission have in place a robust EEO program.

A. Does a person have a protected right to inclusion in an applicant pool from which others are excluded because of their race or gender?

The NPRM tentatively concludes that the proposed EEO regulations would not trigger strict scrutiny because, inter alia, they are "crafted as outreach programs that would avoid unequal treatment based on race or gender and would not pressure broadcasters to adopt racial preferences in hiring. In addition, they would not provide preferential information to minorities or impose greater burdens on non-minorities than minorities." Id., 13 FCC Rcd at 23013 ¶23. We fully agree.

In his Concurring Statement to the NPRM, Commissioner Furchtgott-Roth tentatively states that "[a]t least arguably, a person is 'treated unequally' within the meaning of Adarand if [he is] not recruited for a job because of [his] race, while others are." Id. at 23054. This at first appears absolutely correct: it reflects what happens at all too many broadcast stations whose near-exclusive use of word-of-mouth recruitment inevitably results in minorities not being "recruited for a job because of their race, while others are." See pp. 63-72 infra.[91/] However, one early

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91/ If this comment is intended as criticism of "word-of-mouth recruitment without compensating steps such as targeted minority recruitment, we agree wholeheartedly. Such a recruitment regime is inherently discriminatory. See pp. 63-72 infra. Broadcasters behaving in this manner should be disqualified from renewal. Cf. Bilingual II, 595 F.2d at 629 (under the Communications Act, discriminators are not qualified for renewal).

commenter argues that a targeted recruitment program aimed at informing minorities of openings (as opposed to traditional word-of-mouth recruitment which tends to ensure that minorities are uninformed of openings) may be a race-sensitive procedure under Adarand.92/

This astonishing contention is absolutely without merit. No one has a right to be selected from an applicant or interview pool fashioned to exclude qualified minorities and women. As the Supreme Court put it, "Qualified white candidates simply have to compete with qualified black candidates." Paradise, 480 U.S. at 183. For the same reason, an employer has no constitutional right to use recruitment methods which deprive qualified minorities and women of knowledge of job vacancies.93/

The test in determining race neutrality is whether the program promotes inclusion or exclusion: "[i]ncluding more qualified candidates in the pool is, as seems obvious...both proper and desirable. Therefore, techniques of inclusion do not require

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92/ See Comments of Institute for Justice, filed January 14, 1999 ("IFJ Comments") at 1-6.

93/ Institute for Justice all but admits that an individual job applicant would lack standing to challenge a broadcaster's use of targeted recruitment. See IFJ Comments at 3. In making this admission, IFJ apparently recognizes that an individual White male cannot be harmed because a broadcaster recruits minorities. Yet IFJ argues that the licensee could be harmed because "all corporations have finite advertising budgets" so that because a broadcaster may have to run an ad in a minority publication it might therefore "not run an advertisement in a non-minority publication." Id. at 4. This argument is ridiculous. An employer has no equal protection "right" to use recruitment methods which deprive qualified minorities of knowledge of the existence of job vacancies. Moreover, as noted at pp. 7-8 supra, minorities can be recruited, and recruitment records maintained, with essentially zero cost and effort. Thus, there is no material economic consequence flowing from the recruitment requirement.

the traditional Title VII and equal protection analysis that courts have used for techniques of exclusion." Shuford v. Alabama State Bd. of Education, 897 F.Supp. 1535, 1552 (M.D. Ala. 1995) ("Shuford").94/

For example, a program aimed at ending race discrimination has race as its subject matter, but does not confer or deny benefits on account of race. As will be shown below, the EEO Rule is such a program. It does not, on account of race, confer or withhold any benefit to which a person might otherwise be entitled. Instead, it bans discrimination and it requires pro-active steps to prevent unconscious prejudice from infecting the employment process at a federally licensed institution. Therefore, the regulations proposed in the NPRM must be evaluated under the rational basis test, which they pass with flying colors.

One of several rational bases for the proposed regulations is that they "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934...to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976). See pp. 134-66 infra (discussing diversity as a purpose for the regulations); see also pp. 87-133 infra (discussing character and remediation as purposes for the regulations).

94/ "Expanding the pool is an inclusive act. No one can rightly complain because he has been passed over for a more qualified candidate even if that candidate was recruited from a women's college. Exclusion occurs if, for example, the best candidate from the expanded pool fails to get the job because he was passed over for a woman. This can only happen at the selection stage, which occurs after the pool expansion process." Id. at 1553.

The proposed regulations are race-neutral as that term is applied in cases arising after Croson, 488 U.S. at 469. In these cases, courts are required to apply strict scrutiny to evaluate race-conscious contracting programs. As we discuss in detail at pp. 73-86 infra, the courts treat recruitment-based remedies as narrowly tailored because they are race-neutral. See Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1557-58 (11th Cir. 1994) ("Peightal"); Billish v. City of Chicago, 962 F.2d 1259, 1290 (7th Cir. 1992), vacated on other grounds, 989 F.2d 890 (7th Cir.) (en banc), cert. denied, 114 S.Ct. 290 (1993); Coral Construction Co. v. King County, 941 F.2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992); see also Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994) (in reviewing employment-based affirmative action decrees, the Court held that "the single most important race-neutral alternative contained in the decrees was the requirement that the Board develop and put in place non-discriminatory selection procedures[.]")

A program of targeted recruitment and discrimination-avoidance procedures is innately harmonious with the equal protection component of the Fifth Amendment because such a program does not contemplate that an employer would -- or even could -- consider race or gender in individual employment decisions. That is why most opponents of most affirmative action programs agree that recruitment-based programs are lawful and desirable.95/

95/ Former Senator Bob Dole and Rep. J.C. Watts wrote that "[w]e must remain committed to the traditional form of 'affirmative action' - aggressively recruiting qualified women and minorities as applicants for jobs and other opportunities....These recruitment efforts, when done properly, can go a long way to break down the old boys' network." Bob Dole & J.C. Watts, "A New Civil Rights Agenda," The Wall Street Journal, July 27, 1995, at A-10.

"[T]he line of demarcation between permissible and impermissible affirmative action plans"[96] need not be precisely ascertained in order to identify a program which falls clearly on the lawful side of the line. For example, consider an industry -- like broadcasting -- in which qualified minorities and women have historically been underrepresented. The industry is closely knit, and employers tend to attract the kinds of workers they are comfortable with by filling vacancies with people recommended by current employees who essentially vouch for their friends' qualifications.[97] This is what Bob Dole and J.C. Watts have referred to as the "old boys' network,"[98] through which employees' friends and associates enjoy a decisive advantage over other qualified persons. The best way the government can attempt to cure this type of conscious or unconscious discrimination -- without offending equal protection -- is to require companies to target recruitment efforts toward qualified minorities and women.

A White male who would have been hired if competing only against other White males recruited by word-of-mouth, but who was not hired because an equally or better qualified minority or woman

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96/ Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

97/ Word-of-mouth recruiting relies on "the usual sorts of personnel mechanisms: connections, contacts, friends, cronies, old associates, candidates with powerful sponsors, candidates who 'feel' familiar and comfortable, etc." Christopher Edley, Not all Black and White (1996) at 183. "Unfortunately, this seemingly innocent recruiting practice makes it particularly hard for African Americans to improve their status. Relying on employee recommendations effectively excludes from good jobs those who do not have relatives and friends with good jobs." Barbara Bergmann, In Defense of Affirmative Action (1996) at 79. The practice is apparently quite widespread. Archur Stinchcombe, Information and Organizations 243-44 (1990).

98/ See n. 95 supra.

learned of the job as a result of targeted recruitment, has not been deprived of any right owed to him under the equal protection component of the Fifth Amendment. "Whites and men are harmed only by competition from qualified candidates, which is not an appropriate objection." Shuford, 897 F.Supp. at 1553.

Whenever reverse discrimination is impossible under an affirmative action plan, no conflict between that plan and equal protection can arise. That is why a program in which the employer must refrain from discrimination, establish and maintain positive and continuing efforts to recruit, employ and promote qualified minorities and women, and engage in ongoing assessment and refinement of EEO efforts is entirely harmonious with equal protection.

Under the proposed regulations, all job applicants have a fair opportunity to compete for vacancies and to be treated without discrimination once employed. The proposed regulations would emphatically require that employee selection and retention decisions be nondiscriminatory. NPRM, 13 FCC Rcd at 23024 ¶52. The targeted recruitment provisions of the proposed regulations will ensure that qualified minorities and women may learn of job vacancies and compete for them, thereby counterbalancing the impact of word-of-mouth recruiting from homogeneous station staffs.

At the same time, the proposed regulations do not exclude White men. They cannot be steered away or discouraged by a broadcaster's notifications of sources of minority or female applicants. See South Suburban Housing Center v. Greater South Suburban Bd. of Realtors, 935 F.2d 868, 883-84 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992) ("South Suburban") (discussed in

further detail at 77-78 infra) (holding that a recruitment program aimed at notifying more minorities of housing vacancies was race-neutral, and thus not violative of Title VIII, in the absence of concrete evidence of steering away of people who would otherwise apply). Moreover, the discrimination-prevention provisions of the proposed regulations will ensure that licensees will guard against the unfortunate tendency for unconscious prejudices to infect personnel decisions.99/

The proposed regulations do not contemplate sanctions based on the use of hiring statistics. Instead, they would order remedial measures only when a licensee has failed to self-assess its EEO efforts and take corrective steps to recruit fairly. In no case could these corrective steps include reverse dicrimination.100/

99/ Discrimination surely occurs at the subconscious level. See, e.g., Claudia Goldin & Cynthia Rouse, "Orchestrating Impartiality: The Impact of 'Blind' Auditions on Female Musicians" (Harvard University and Princeton University, June 17, 1997) (unpublished manuscript, on file with counsel of record) (finding that a change in symphony orchestras' audition procedures - the adoption of "blind" audition with a "screen" to conceal the identity of the candidate from the jury - suggests that the "blind" procedure fostered impartiality in hiring and increased the proportion of women in symphony orchestras). The fact that employers are seldom able to check all of their subconscious prejudices at the interview room door adds urgency to maximizing the number of minorities and women who at least have a chance to display their talent and break through employer prejudices.

100/ This requirement will hardly require a sea change in the FCC's approach to EEO. Under the previous EEO Rule, the Commission was only twice faced with licensees' proposals to engage in reverse discrimination. The FCC denounced each licensee's behavior. In Applications of Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia, 95 FCC2d 1 (1983) ("Alabama/ Georgia Renewals"), the licensee hired a White woman as a receptionist with the understanding that she would be replaced when a qualified Black person was found. The FCC held that:

[n. 100 continued on p. 63]

Thus, the proposed regulations are race-neutral. They will prevent all forms of discrimination, exclude no qualified Whites, and deprive Whites of no benefits to which they would otherwise be entitled.

B. Can "word-of-mouth" recruitment and similar tactics prevent minorities and women from learning about and discourage them from seeking employment?

A seemingly race-neutral employment practice which results in a substantial disparity between the percentage of minorities and women in the qualified applicant pool and the percentage hired, may

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100/ [continued from p. 62]

> [T]he licensee may have misconstrued the intent of our nondiscrimination rule....We wish to make clear that particular positions are not to be set aside for any reason that would suggest discrimination... we shall require that the licensee submit a revised EEO program which sets forth the steps it proposes to increase the flow of minority job applicants... we admonish the licensee to review its personnel policies and practices to assure nondiscrimination in all aspects of its operation.

Id. at 9. In Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc., 10 FCC Rcd 6589 (ALJ, 1995) ("Gaines"), the licensee had proposed to reserve the next three vacancies at the station solely for minorities. The ALJ ruled that this was "discriminatory on its face and grossly inconsistent with the Commission's EEO Rules." Id. at 6593.

Indeed, the FCC routinely renewed the licenses of stations with no minority employees as long as the licensee operated a program reasonably expected to attract qualified minority and female applicants and offer them a fair opportunity to compete for vacancies. In Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area, 5 FCC Rcd 4893 (1990), recon. denied, 8 FCC Rcd 398 (1993), aff'd, Florida NAACP, 24 F.3d at 271, the FCC held that although the stations had hired no minorities for any of 54 hiring opportunities during the license term in an area where the available labor force was 15.2% minority, sanctions would be issued only because "the licensee did not maintain adequate records and does not appear to have engaged in meaningful self-assessment of its EEO program. Had it done so, it would have discovered that its recruitment efforts were not productive." Id. at 4898.

give rise to an inference of discrimination,[101] even in the absence of evidence of any subjective intent to discriminate.[102]

A long-recognized type of apparently race-neutral, but discriminatory, employment practice is "recruitment discrimination." It is found when qualified and potentially interested job seekers are not equally likely to discover employment opportunities because of personal characteristics unrelated to their qualifications for and interest in the jobs.[103]

101/ NAACP v. Town of East Haven, 998 F. Supp. 176, 183 (D. Conn. 1998) ("East Haven"), citing Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) ("Dothard"). See generally B. Lindemann and P. Grossman, Employment Discrimination Law, 3d ed., Vol. 1 (1996) ("Lindeman and Grossman") at 697; F. Bloch, Antidiscrimination Law and Minority Employment (1994) ("Bloch") at 28 (presenting an economic and statistical analysis of discriminations in employment). However, a Title VII plaintiff does not make out a case of disparate impact simply by showing that there is racial imbalance in the workforce. Instead, the plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.

102/ East Haven, 998 F. Supp. at 183, citing Wards Cove, 490 U.S. at 645-46; Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975) (word-of-mouth as the primary method of recruiting was discriminatory because it tended to perpetuate the all-White work force); EEOC v. Andrew Corp., 49 FEP 804, 819 (N.D. Ill. 1989) (more than half of referrals came from friends and relatives who were current employees); United States v. Village of Elmwood Park, 43 FEP 995, 997 (N.D. Ill. 1987) (exclusive use of word-of-mouth recruitment in an all-White workforce was discriminatory); NAACP v. City of Corinth, 83 F.R.D. 46, 62, 20 FEP 1044 (N.D. Miss. 1979) (failure to advertise except by word-of-mouth was discriminatory). In Franks v. Bowman Transp. Co., 495 F.2d 398, 419-20 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747 (1976), the employer's heavy reliance on word-of-mouth recruitment rebutted the employer's contention that the all-White composition of the office workforce was due to a lack of interest in those jobs among Blacks; the court ordered the employer to advertise office vacancies through a medium specially designed to reach Blacks. Similar relief was ordered in Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792 (3d Cir. 1991) and Waters v. Olinkraft, Inc., 475 F. Supp. 743 (W.D. Ark. 1979).

103/ Bloch at 28.

As noted earlier, word-of-mouth recruitment by a homogeneous staff is such a practice. See pp. 18-23 supra. The reason is clear: one's social interactions -- the basis for word-of-mouth recruitment -- are unrelated to one's qualifications for and interest in employment. Reliance on these social interactions as the basis for recruitment excludes those who do not possess the do not possess the race and gender attributes of the employer's staff.104/ Thus, where statistics show that minorities or women are significantly underrepresented in the employer's workforce, an employer's exclusive or heavy reliance on word-of-mouth recruitment may become evidence of intentional discrimination.105/

It's a fact that much of American social life is still organized by race and gender. Friendships strong enough to generate job referrals often form in the crucible of fraternity, church or family ties. Business networking often occurs after

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104/ Bloch at 38. See generally University of Massachusetts, "Barriers to the Employment and Work-Place Advancement of Latinos: A Report to the Glass Ceiling Commission" (August, 1994) at 52 (word-of-mouth recruiting methods that rely on social networks are "a significant exclusionary barrier" to employment opportunities for minorities); R. Thomas et. al., "The Impact of Recruitment, Selection, Promotion and Compensation Policies and Practices on the Glass Ceiling", submitted to the U.S. Department of Labor Glass Ceiling Commission (April, 1994) at 14 (noting that recruitment practice primarily consist[ing] of word-of-mouth and employee referral networking...promote the filling of vacancies almost exclusively from within. "Word-of-mouth recruitment is much more likely to exclude applicants of certain racial or ethnic groups than to exclude potential applicants by sex, age or any other characteristics on the basis of which communities are generally not suggested.")

105/ See Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972) (White employees found not to socialize with or know Blacks who might be qualified for available work); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 427 (8th Cir. 1970) (current employees tended to recommend their own relatives, friends, and neighbors for available work). See also Lindemann and Grossman at 699-700.

hours or on weekends at private clubs, which are under no legal obligation to integrate notwithstanding their great importance to the stream of commerce.106/

"Courts generally agree that [word-of-mouth] hiring is outweighed by the goal of providing everyone with equal opportunities for employment."107/ The EEOC recognizes that word-of-mouth referrals may be found to be discriminatory to the extent that they depend upon an employer's current workforce. The EEOC has stated that "[i]f that workforce is, for example, almost entirely white, male or young, then word-of-mouth referrals will only reinforce the non-diverse nature of the workforce and discriminate against persons who are not white, male or young."108/

Word-of-mouth recruitment is particularly pernicious because the employee roster established through this type of recruiting becomes self-perpetuating. If the employee roster is predominantly White or male, the effect of word-of-mouth recruitment may be to deprive minorities or women of information about openings, thereby

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106/ See Moose Lodge v. Irvis, 407 U.S. 163, 174 (1972).

107/ Thomas v. Washington, 915 F.2d 922 (4th Cir. 1990); see also Robinson v. Lorillard Corp., 444 F.2d 791, 798, n. 5 (4th Cir. 1971) (restrictions on union membership to relatives of current members was discriminatory); Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1303 (9th Cir. 1982); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972).

108/ EEOC Technical Assistance Programs, "Employer EEO Responsibilities: Preventing Discrimination in the Workplace, the Law and EEOC Procedures" (1996) at K-4.

perpetuating the race and gender composition of the roster.[109]

Other employment practices that may lead to a finding of discrimination include the exclusive reliance on particularly limited sources of applicants where these sources do not produce a diverse applicant pool.[110] For example, heavy reliance on walk-in applications may be discriminatory because such a practice can artificially restrict the applicant pool those who hear of job openings through word-of-mouth.[111]

109/ Lindemann & Grossman at 700; see also Thomas v. Washington County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990) (use of word-of-mouth operated to perpetuate the effects of past discrimination); EEOC v. Metal Serv. Co., 892 F.2d 341, 350-51 (3d Cir. 1990) (word-of-mouth recruitment where an all-White workforce was strong evidence of discrimination; Domingo v. New England Fish Co., 727 F.2d 1429, 1435-36, modified, 742 F.2d 520 (9th Cir. 1984) (use of Whites to recruit by word-of-mouth resulting in all-White workforce and giving preferences given to friends and relatives of existing employees was discriminatory, resulting in all White hirees); NAACP v. City of Evergreen, 693 F.2d 1367, 1369 (11th Cir. 1982) (employer's exclusive use of word-of-mouth operated to benefit Whites and to reduce number of potential Black applicants); EEOC v. Detroit Edison Co., 515 F.2d 301, 313 (6th Cir. 1975) (discrimination in the practice of relying on referrals by a predominately White workforce); Long v. Sapp, 515 F.2d 34, 41 (5th Cir. 1974) (word-or-mouth recruitment served to perpetuate an all-White workforce).

110/ Lindemann & Grossman at 707-08. For example, in EEOC v. N.Y. Times Broadcasting, Inc., 542 F.2d 356, 360-61 (6th Cir. 1976), the Sixth Circuit held that a television station engaged in unlawful hiring practices when it recruited broadcast news personnel solely from two radio stations that had employed virtually no women in such positions.

111/ Lindemann & Grossman at 707. Conversely, an employer's refusal to accept walk-in applications may establish a prima case of discrimination. Lindemann & Grossman at 708, citing Furnco Construction Corp. v. Waters, 438 U.S. 567, 576-78 (1978) (holding that a prima facie case of discrimination was established by an employer's refusal to consider the qualifications of "walk-in" applicants, including many African-Americans, because it believed that applicants recruited otherwise were more likely to be experienced and competent. However, the Supreme Court rejected the Court of Appeals' conclusion that an employer must use the method that allows the employer to consider the qualifications of the largest number of minority applicants.)

The Commission has never sanctioned a licensee for word-of-mouth recruitment performed by a diverse staff. That practice is inoffensive because qualified members of each racial group are likely to learn of job openings in this way. But when the recruiters are members of a racially homogeneous staff, the Commission has long recognized that word-of-mouth recruitment is inherently discriminatory.[112/] As the Commission held in the leading FCC case on this subject, the licensee unlawfully used "employment practices which discriminated against minority groups in recruitment and employment" including "'word of mouth' referrals from a predominately white work force, which, while unintended, effectively discriminated against minority group employment." Walton Broadcasting, Inc., 78 FCC2d 857, 865. 875, recon. denied, 83 FCC2d 440 (1980).[113/]

Word-of-mouth recruitment is especially dangerous in a close-knit industry like broadcasting. Broadcasters tend to be

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112/ See, e.g., Jacor Broadcasting Corp., 12 FCC Rcd 7934, 7939 ¶14 (1997) (reconsideration pending) (Commission was "troubled that a significant number of the stations' hires [63 out of 109 (57.8%], for which recruitment efforts were made, resulted from staff or client referrals" (fn. omitted); William H. Schuyler, 44 RR2d 559 (1978); Triple R, Inc., 42 RR2d 907, 908 (1978).

113/ In The Lutheran Church-Missouri Synod (MO&O), 12 FCC Rcd 2152 (1997), rev'd. in Lutheran Church, supra and vacated in 13 FCC Rcd 23328 and Erratum (December 3, 1998), the Commission failed to appreciate how word-of-mouth recruitment works to minorities' disadvantage. The Commission actually credited the licensee with having a "network" of Black female employees who recruited other Black females. Id. at 2161-62 ¶17. Actually, with one brief exception, these women were secretaries or receptionists, and they used "word-of-mouth" to recruit each other. There was no evidence in the record that any Black persons ever learned about, much less applied for, any jobs other than lower level jobs. Targeted recruitment of minorities was used during the license term only twice -- in the last few days of the license term -- for a secretarial and a janitorial position; then it was abandoned after the renewal term ended. To its credit, the Synod has since reformed these discriminatory procedures.

comfortable when an employee vouches for a job applicant's qualifications. That is how the "old boys' network works. Because of that network, employees' friends and associates enjoy a decisive advantage over other qualified persons.

The only way the FCC can attempt partly to mitigate this behavior is to require companies to target recruitment efforts toward qualified minorities and women. However, targeted recruitment will not entirely level the playing field. The customary recruitment from nonminority sources, combined with some word-of-mouth contacts, will invariably be far more effective in reaching the pool of qualified nonminority candidates than targeted recruitment alone will be effective in reaching the pool of qualified minority candidates. Furthermore, candidates sent as a result of targeted recruitment are strangers competing with "friends of friends" who arrive for an interview with a foot in the door already. But at least targeted recruitment partly alleviates the overwhelming odds favoring nonminorities when the only means of recruitment from a homogeneous workforce is by word-of-mouth.114/

Other tactics besides word-of-mouth recruitment can impose a chilling effect on minority and female employment opportunities.115/ A chilling effect can arise from overt acts of

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114/ This is why the assertion that targeted minority and female recruitment somehow puts White men at a disadvantage is absurd. See IFJ Comments at 4. As long as word-of-mouth recruitment is permitted at all, White men will always enjoy a huge recruitment headstart against everyone else. Targeted recruitment at least allows minorities and women to enter and run the race. As shown from the utter absence of reverse discrimination complaints in the history of FCC EEO regulation, White male broadcasters can surely be trusted to give other White men a fair shake.

115/ East Haven, 998 F. Supp. at 184, citing Wards Cove, 490 U.S. at 657; Watson, 487 U.S. at 994.

discrimination that directly discourage minorities and women, such as routinely turning away minority or female applicants. A chilling effect can also arise from more subtle and unintended practices, such as having a sex-segregated workforce,[116] never having hired Blacks;[117] having residency requirements in a community where racial minorities do not reside.[118] All of these behaviors create a reputation that the employer discriminates, which in turn deters other potential minority or female applicants.[119]

A recent case from Connecticut is instructive on this concept. In East Haven,[120] the NAACP alleged racial discrimination in the defendant's practice of hiring employees for

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116/ Kohne v. IMCO Container Co., 480 F. Supp. 1015, 1037 (W.D. Va. 1979) (sex-segregated industry discouraged potential female applicants).

117/ EEOC v. Peterson, Howell & Heather, Inc., 702 F. Supp. 1213, 1227-28 (D. Md. 1989) (evidence showing employer had reputation for discrimination sufficient to defeat summary judgment); United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 559 (W.D.N.C. 1971) (employer with all-White workforce gave discriminatory reputation); Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969) (discriminatory reputation discouraged Blacks from applying), aff'd in relevant part, 438 F.2d 86, (4th Cir. 1971); cf. Babrocky v. Jewel Food Co., 773 F.2d 857, 867 (7th Cir. 1985) (employer filled positions through union hall and union never recommended female members; thus, the plaintiff need not have filed an application to have a cause of action); Draper v. Smith Tool & Eng. Co., 728 F.2d 256, 256-57 (6th Cir. 1984) (discrimination found where employer had never hired a Black person and failed to hire a qualified Black applicant.)

118/ See e.g., Mister v. Illinois Cent. Gulf R.R. Co., 832 F.2d 1427, 1431-35 (7th Cir. 1987) (residency rules may have chilling effect on Black applicants); Kilgo v. Bowman Transp. Inc., 570 F.Supp. 1509, 1517 (N.D. Ga. 1983) (defendant's requirement of one year's experience in over-the-road driving was more likely to dissuade women than men from applying.)

119/ See generally Lindemann & Grossman at 711-12.

120/ 998 F. Supp. 176.

town jobs without a thorough and effective outreach program and this practice was responsible for a "perceived animus" against Blacks, which discouraged them from applying for jobs.[121/] The NAACP showed that over a period of more than a decade, the town employed no Black civil service workers and no Black schoolteachers.[122/]

The court held that the plaintiffs had made out a prima facie case of discrimination, as the discrepancies between employment of Blacks and that of Whites went far beyond the statistical deviations necessary to draw an inference that race was a factor[123/] and were so large as to overcome the innocuous explanation for the discrepancy.[124/] In the court's view, the Town's argument that there was no showing of any discriminatory treatment of any Black applicant and its explanation, (i.e., lack of qualified Black applicants who successfully passed race-neutral screening) missed the point. The argument did not relate to the necessity to overcome the Black community's negative perception of the Town's hiring practices with an effort calculated to produce what the Town asserted it sought, i.e., a reasonable number of qualified Black applicants such that more Blacks will pass the application procedures and be ranked high enough to be hired.[125/] Indeed, it was the paucity of qualified Black applicants that

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121/ Id. at 184.

122/ Id. at 178. Only a few Blacks were employed; they were in positions such as messenger, part-time coach, part-time tutor, teacher's aide.

123/ Id. at 185.

124/ Id.

125/ Id.

proved the plaintiff's point.126/ The court concluded that plaintiffs proved that Blacks were not being hired because they were discouraged by the hiring process and found that a "remedy which overcomes, or tends to neutralize, race as a lurking element was warranted" and that even in the absence of any affirmative conduct of a discriminatory nature, "recruiting (or non-recruiting) which has a discriminatory effect is not an improper basis for relief."127/ The relief sought and granted did not include quotas, nor did it provide that specific jobs must go to Blacks. Instead, it required an outreach program which would overcome the inhibitions which have discouraged qualified Blacks from seeking town employment in numbers representative of the makeup of the Black community.128/ The court stated that "this is in keeping with the prophylactic objective of Title VII," which is to "achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees."129/

In that spirit, we support the NPRM's proposed outreach program, and we recommend that the Commission consider, as evidence of discrimination, the full range of "recruitment discrimination" and chilling effect practices discussed herein. See Volume II infra.

126/ Id. at 186.

127/ Id. at 187.

128/ Id.

129/ Id.

C. If an employer is asked to recruit minorities and women, is he thereby "pressured" to hire minorities or women?

The original Lutheran Church panel struck the affirmative action portion of the EEO Rule because it felt that this portion "extende[d] beyond outreach efforts and certainly influence[d] ultimate hiring decisions." Lutheran Church, 141 F.3d at 351. The panel felt that requiring stations to evaluate their staff composition against that of the area workforce to avoid "underrepresentation" implied that if such a situation existed, the station was behaving in a manner that fell short of the desired outcome. Id. It concluded that the regulations pressured stations to maintain a workforce that mirrored the racial breakdown of the metropolitan statistical area; in other words, the regulations could be read to require or encourage "stations to aspire to a workforce that attain[ed] or at least approach[ed], proportional representation". Id. at 351-52. Having found a racial classification, in accordance with its reading of Adarand, the court ruled that strict scrutiny was required.

However, the court acknowleged that not all race-conscious actions (such as recruitment and outreach) create racial classifications. It expressly recognized that "[i]f the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated." Id. at 350. In denying rehearing en banc, the Court majority added that "the fact of encouragement [of minority hiring]...does not mean that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny." 154 F.3d at 492.

The proposed new regulations completely eliminate the race-consciousness perceived by the court. Nothing in the proposed regulations can be read to pressure or encourage hiring minorities or women in numbers representative of the general labor force, or in any other numbers; or to penalize the failure to hire minorities or women as long as hiring is performed on a nondiscriminatory basis. No special review of applications or other sanctions would be triggered by a nondiscriminating licensee's failure to hire women or minorities. The proposed regulations are opportunity-enhancing, and they are designed to ensure that persons of all races and both genders have a reasonable opportunity to learn about, apply for, and be considered for available positions. They require no more than inclusive outreach efforts and do not require or even suggest that actual hiring decisions relate to the race or gender of any applicant or to the workforce.

As we have noted, such opportunity-enhancing measures are regarded by the courts[130/] and the Justice Department[131/] as race-neutral, even when an employer is consciously acting to increase the number of applications from minorities and women.

130/ Lutheran Church, 141 F.3d at 350; see pp. 75-86 supra.

131/ See p. 83 n. 145 infra. In a 1996 memorandum by the Department of Justice to general counsels of federal agencies, providing guidance on the use of affirmative action in federal employment in light of Adarand, the Department advised agencies that Adarand does not apply to actions in which race is not used as a basis for making employment decisions about individuals. This means that actions taken to increase minority applications, and programs designed to make minority firms aware of contracting opportunities and to help them take advantage of those opportunities were not subject to strict scrutiny since they are race-neutral. Justice Department Memorandum, "Proposed Reforms to Affirmative Action in Federal Procurement", 1996 DLR 100 d22, May 23, 1996.

A recent case from the First Circuit is instructive on this point. In Raso v. Lago, 135 F.3d 11 (1st Cir. 1998) ("Raso"), the issue on appeal was whether a HUD program violated equal protection principles by establishing a forbidden racial classification. Under the program, a housing developer, as a condition of funding, was expected to adopt and carry out an outreach program to attract minority as well as majority applicants, including mailings to minority organizations and making assurances of nondiscrimination, Id. at 13-15. See 24 CFR §§200.620 (1997). The new housing was intended to replace demolished old housing. Under a state statute, those displaced tenants would have been entitled to preferences in the selection of tenants for the new housing. In order to carry out the required outreach program, it was necessary to eliminate some of the statutory preferences.132/

The court held that the outreach plan did not create a suspect racial classification. It began by explaining that a "racial motive" or a racial purpose or goal is not synonymous with a constitutional violation. Indeed, "[e]very antidiscrimination

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132/ The city was also operating under a consent decree. The consent decree was based on a finding that HUD had failed to meet statutory obligations to ensure that the minority population of Boston had equal access to public housing, and provided that all Boston area HUD affirmative fair housing marketing plans "shall have as their goal and measure of success the achievement of a racial composition, in HUD-assisted housing located in neighborhoods that are predominantly white, which reflects the racial composition of the city [of Boston] as a whole." Raso, 135 F.3d at 14. After mediation between the non-profit organization representing former tenants and the developers, the mediator proposed that former tenant's would receive a preference as to 55% of the units and "all other applicants would have equal access to the remaining 45%. The former tenants did not agree. The tenant selection process was otherwise by lottery. The former tenants sued, arguing that they were deprived of their statutory preferences for all the apartments based upon "a racial classification." Id.

statute aimed at racial discrimination and every enforcement measure taken under such a statute, reflects a concern with race. Such race-conscious purposes do not make enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause."

The key issue, therefore, was whether a governmental action had been taken on the basis of a "racial classification." No facts were alleged to support a finding of "racial classification." Instead, under the affirmative marketing plan, apartments freed from the statutory preferences were made available to all applicants regardless of race. All that the plan did was to ensure equal treatment of applicants regardless of race. As the provider of the funds for the housing, the government had the right to insist, as a condition of this investment, that a fair number of the apartments should be open to application by tenants of all races. Id. at 16.

The court considered Adarand as almost the opposite of the case under consideration. In Adarand, the statute gave special incentives to government contractors to hire minority subcontractors. Id. at 17, citing Adarand, 515 U.S. at 205-06 and Croson, 488 U.S. at 493-94. Here, the government required that recipients ensure that some of the apartments -- which otherwise would have almost automatically been occupied by whites -- be made available to all applicants on a race-blind basis."133/

133/ Raso, 135 F.3d at 17-18. Along similar lines, see Peightal, 26 F.3d at 1557-58 (holding that presentations at job fairs and career days designed specifically to apprise minorities of career opportunities are race-neutral).